



SEAFOOD INSPECTION PROGRAM
U.S. DEPARTMENT OF COMMERCE
1315 EAST-WEST HIGHWAY
SILVER SPRING, MARYLAND 20910-3282
USA



June 3, 2003

Mr. Otto J. Wolff
Chief Financial Officer and
Assistant Secretary for Administration
U. S. Department of Commerce
1401 Constitution Avenue, N.W.
Room 5828
Washington, D.C. 20230

Dear Mr. Wolff:

I am submitting the attached document under the provisions Section 3 (e) of the Federal Activities Inventory Reform Act of 1998 as a formal Appeal of the NOAA decision to continue to list the activities of the USDC Seafood Inspection Program under the FAIR Act inventory as not inherently governmental functions (i.e., commercial activities).

I look forward to your written concurrence that the activities of this fully reimbursable Program (whose focus is centered on the inspection and certification of the safety, wholesomeness, proper labeling, and quality of fishery products for the benefit of industry and consumers) are logically concluded to be inherently governmental functions.

Sincerely,

Richard V. Cano
Acting Director
Seafood Inspection Program
NMFS/NOAA/USDC



**Appeal
Of the NOAA Decision to Continue the
Listing and Designation of the
USDC Seafood Inspection Program
As a Commercial Activity**

ABSTRACT: The USDC Seafood Inspection Program is a fully reimbursable program that inspects/certifies approximately 17% of the fishery products consumed in the United States, while also providing inspection and certification of more than 142 million pounds of U.S. exports to meet the requirements of foreign governments and buyers. Sanitation and hygienic practices are evaluated, along with product inspection in approximately 240 processing plants located throughout the U.S., American Samoa, and Puerto Rico. In addition, product lot inspections are conducted for approximately 2500 firms annually. This Appeal demonstrates that the NOAA decision to continue to list and designate the USDC Seafood Inspection Program as a “commercial activity” has failed to address: 1) the intent of the FAIR Act as recognized under its exemption for a “Nonappropriated funds instrumentality”; and 2) facts that demonstrate that the Program performs inherently governmental functions to the benefit of industry and consumers. Additional information is provided regarding statutory, economic, and logistical considerations which further demonstrate that the USDC Seafood Inspection Program was inappropriately identified for inclusion under the FAIR Act, and that no benefits would be afforded to the U.S. taxpayer while significant disruption and additional costs could be experienced by affected industry members.

APPEAL

The following Appeal is being submitted under the provisions of Section 3 (Challenges to the List) of the Federal Activities Inventory Reform Act of 1998 (subsequently referred to as the FAIR Act). The FAIR Act states, in part,:

Sec. 3. CHALLENGES TO THE LIST

- (a) Challenge Authorized.—An interested party may submit to an executive agency a challenge of an omission of a particular activity from, or an inclusion of a particular activity on, a list for which public availability has been published under section 2.
- (b) Interested Party Defined.—For the purposes of this section, the term “interested party”, with respect to an activity referred to in subsection (a), means the following:
- (1)....
 - (2)....
 - (3) An officer or employee of an organization within an executive agency that is an actual or prospective offeror to perform the activity.
 - (4)....

(c) Time for Submission.--A challenge to a list shall be submitted to the executive agency concerned within 30 days after the publication of the notice of the public availability of the list under section 2.

(d) Initial Decision.--Within 28 days after an executive agency receives a challenge, an official designated by the head of the executive agency shall--

(1) decide the challenge; and

(2) transmit to the party submitting the challenge a written notification of the decision together with a discussion of the rationale for the decision and an explanation of the party's right to appeal under subsection (e).

(e) Appeal.--

(1) Authorization of appeal.--An interested party may appeal an adverse decision of the official to the head of the executive agency within 10 days after receiving a notification of the decision under subsection (d).

A Challenge (Attachment A) was submitted to the Chief Financial Officer and Chief Administrative Officer of NOAA on March 5, 2003 that provided detailed information and reasons why the NMFS/NOAA decision to list and designate the USDC Seafood Inspection Program as a “commercial activity” was inappropriate and contrary to the interests of taxpayers, industry and consumers.

The NOAA decision regarding this Challenge (Attachment B) was delivered on May 20, 2003, or 54 business days after the Challenge was filed with NOAA, even though the FAIR Act specifically states that the agency shall decide and transmit a decision within 28 days.

The concluding paragraph of the inexplicably late NOAA decision reads:

In conclusion, NOAA will not change the designation of the activities of the USDC Seafood Inspection Program. The Department of Commerce and the NOAA’s General Counsel has also up held *[sic]* NOAA’s decision on the coding of the above positions as commercial in nature. Your office may appeal this decision within 10 working days after receiving this written notification.

(emphasis added)

Assuming that the statement above is factual, I question the appropriateness of the Appeal being filed with the Department of Commerce in light of the fact that it has already made a decision on this matter. It would seem more appropriate that the Appeal should be forwarded to, and that the decision on the Appeal should be rendered by, a body that is unbiased.

Response to the NOAA Decision

The NOAA decision states:

These challenges advance two reasons for removing the Seafood Inspection Program (SIP) from the list of “commercial” activities: (1) exemption under the FAIR Act and (2) inherently governmental function.

In fact, the Challenge provides many more reasons beyond the two delineated, and incompletely addressed, by NOAA. These additional points will again be raised in this Appeal.

(1) Exception under the FAIR Act

NOAA attempts to rapidly dispose of the point made in the Challenge regarding the exceptions under the “Nonappropriated funds instrumentality” provision of the FAIR Act by stating that the citation in the Act refers in Title 5 to employees “... paid from nonappropriated funds of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, ...” and that no SIP employees would fall within this reference. Considering that the intent of the Act is to reduce the cost of Government to the benefit of U.S. taxpayers and that Congress could not be expected to identify every “Nonappropriated fund instrumentality”, it would be more reasonable to look upon this Title 5 reference as merely some examples of activities that would qualify, and not to be read as a limitation.

The ultimate intent of the Act, namely to reduce the costs of Government to the benefit of taxpayers, was addressed in Senator Craig Thomas’ (sponsor of S. 314, which became the FAIR Act) remarks to the U.S. Senate on July 27, 1998. The following excerpts are taken from that address:

... After a hearing on that bill was convened by Senator Stevens, during his tenure as Chairman of the Committee on Governmental Affairs, it became clear to me that it was necessary to add to the bill the concept of competition to determine whether government or private sector performance resulted in the best value to the American taxpayer. ...

Mr. President, this is important legislation that I believe will truly result in a government that works better and costs less. ...

(emphasis added)

These statements were repeated by Senator Thomas in further comments before the Senate on July 28, 1998.

On October 5, 1998, S. 314 was considered for passage by the U.S. House of Representatives. The following excerpts were taken from the remarks by Congressmen in support of this legislation and further demonstrate that the Congressional intent of the legislation, as well as the Administration’s intent, was to reduce the cost of Government to benefit U.S. taxpayers:

Congressman Sessions (Texas):

... We need to bring home value to taxpayers. This legislation is a tool to do a favor for every U.S. taxpayer.

Congressman Duncan (Tennessee):

Mr. Speaker, I rise in strong support of S. 314. I thank the gentleman from Texas (Mr. Sessions) for yielding me this time. This legislation is now called the Federal Activities Inventory Reform Act. It is, I think, a bipartisan and I believe a very noncontroversial bill. In fact, the administration issued a statement on Friday saying, quote, this bill is consistent with administration efforts to reform Federal procurement and ensure that taxpayers receive the best value.

(emphasis added)

The intent of the Act is further reinforced in the following statement found under the website of the Office of Management and Budget

(<http://www.whitehouse.gov/omb/circulars/a076/print/a076tm20.html>) for the purpose of explaining the FAIR Act;

... The Federal Government seeks to achieve economy and enhance productivity and quality to obtain the best service at the least cost to the American taxpayer. ...

(emphasis added)

As previously stated in the Challenge, NOAA provides a succinct description of the FAIR Act and the subsequent A-76 process under its website entitled "A-76 Studies, Frequently Asked Questions" (<http://www.ofa.noaa.gov/~audit/noaa/A-76faq.htm>), which includes the following statements:

... The Federal Activities Inventory Reform (FAIR) Act of 1998 requires federal agencies to submit to the Office of Management and Budget (OMB) an annual list of activities performed by government employees that, in the judgement of the agency head, are not inherently governmental functions. OMB requires agencies to conduct A-76 competitions on a percentatge [*sic*] of their commercial functions each year.

... The goal of the A-76 process is to improve efficiency and reduce costs to the taxpayer.

(emphasis added)

The USDC Seafood Inspection Program is fully funded through the fees that are assessed and collected from the industry members that participate in the Program. No appropriated funds are used to support this Program. In addition, the Program actually contributes approximately \$1.6 million annually to NMFS and NOAA in overhead costs, thus reducing these agencies' appropriated funds needs. To attempt to outsource the activities of the Program is clearly contrary to the intent of the Act in that it would not benefit the U.S. taxpayer, but in fact would subject the taxpayer to additional burdens of approximately \$400,000 to conduct the study, an additional \$1.6 million annually in lost funds, and possibly approximately \$1.8 million in additional severance costs if the Program is contracted to the private sector. Therefore, a more

rational interpretation of the Act is to recognize that such nonappropriated funded programs are excepted under Sec. 4. (b)(3) of the FAIR Act as a “Nonappropriated funds instrumentality”.

(2) Inherently Governmental Function

NOAA begins its decision under this section with the following statement:

Attachment A to OMB Circular No. A-76 (Revised) states that “agencies shall presume all activities are commercial in nature unless justified as inherently governmental in accordance with paragraph E.” ...

It is evident from the statement and quote provided that NOAA inappropriately used the November 14, 2002 draft OMB revision of Circular No. A-76.

On November 19, 2002, OMB issued a notice in the *Federal Register* of proposed changes to Circular No. A-76. These proposed changes proved to be highly controversial and elicited considerable Congressional concern and comment (e.g., letter of February 3, 2003 from the United States Senate Committee on Health, Education, Labor, and Pensions to Mitchell Daniels, Director, OMB (Attachment C)), as well as more than 700 public comments. These concerns and comments resulted in significant changes in the proposed revision, including the elimination of the language quoted in the NOAA decision. The revised circular was finally issued and implemented on May 29, 2003.

The inappropriate use of a draft document raises obvious questions regarding the appropriateness of the resultant decision.

Although the NOAA decision does recognize that “... some of the functions of the SIP may arguably be construed as inherently governmental...”, it opines that others may not be inherently governmental. The Challenge provided detailed discussion of the functions and activities performed by the USDC Seafood Inspection Program on pages 4-9. Included in this discussion were comparisons and associations to the activities of FDA and USDA, both of which have classified their inspection activities as inherently governmental functions. In the event that NOAA believed that it did not have enough information to render a decision on this subject, it could have sought additional clarification from the Program, other agencies, or Program participants during the 26-day period that it was in violation of the response provisions of the FAIR Act.

Recognition of the value of the functions performed and the necessary continued performance by the Government are found within the comments and positions expressed by the following Congressional representatives, trade associations, media, Program participants, and the Government of Canada:

Congressman Barney Frank in a letter to the Secretary of Commerce, Donald Evans expressed his support that the Program be declared as an inherently governmental function (Attachment D).

Senator Susan Collins (Chairman of the U.S. Senate Committee on Governmental Affairs) in a letter to Under Secretary Lautenbacher delineated concerns regarding greatly diminished confidence in SIP certification if government inspectors are replaced by commercial vendors; dampened consumer demand for U.S. seafood; possible refusal by the European Union to recognize SIP certification; and the possibility of lost sales and jobs in the U.S. industry (Attachment E).

The National Fisheries Institute and the Southeastern Fisheries Association both opposed the NMFS/NOAA position to have the activities of the USDC Seafood Inspection Program performed by the private sector. Both trade associations encouraged their members to express their dissatisfaction to NOAA, the Department of Commerce, and/or Congressional representatives (Attachments F, G, and H).

The *WAVE* is a news vehicle that covers international seafood industry news and analysis with reports that are distributed daily Monday through Friday to online subscribers. The Wave has published a number of articles and editorials in opposition to the NMFS/NOAA position to have the activities of the USDC Seafood Inspection Program performed by the private sector. These articles have included interviews with Program participants that similarly oppose the NMFS/NOAA position, raise issues of credibility under a privatized system, and predict disruption to international trade relationships in the event of privatization. (Attachments I, J, K, and L)

The USDC Seafood Inspection Program and the Canadian Food Inspection Agency (CFIA) have been involved in discussions and activities for the purpose of developing an arrangement whereby U.S. product that would be certified by USDC SIP as meeting the regulatory requirements of Canada would be provided expedited entry into Canada. In a letter dated March 19, 2003 from the Director of the Fish, Seafood and Production Division of CFIA, the USDC SIP was informed that if the activities of the Program were conducted by the private sector there could be no arrangement (Attachment M). USDC SIP and CFIA have halted any further discussions and activities on this arrangement until the fate of the USDC Program can be determined and its activities have been classified as inherently governmental.

The issue of recognition by foreign governments was previously identified as a concern by Senator Collins relative to trade with the European Union (EU). As noted in the Challenge, the USDC Seafood Inspection Program provides inspection and certification of more than 142 million pounds of U.S. exports to meet the requirements of foreign governments and buyers throughout the World. China is the most recent foreign government to officially accept USDC export certification of U.S. fishery products as U.S. Federal assurance. The Program is currently involved in working with U.S. industry members to ensure that there is no disruption in the expanding U.S. trade with China when China implements new certification requirements effective June 30, 2003. Although the question has not been specifically posed to China, comments made during discussions to clarify certification requirements with China would lead to a very strong belief that certificates issued by private contractors would not be accepted by

Chinese authorities. It should be anticipated that similar positions would be taken by a significant number of other governments.

In addition to the correspondence cited above, numerous meetings have taken place between the USDC Seafood Inspection Program and Program participants, as well as discussions with representatives of industry trade associations (including the National Fisheries Institute, the Southeastern Fisheries Association, and the U.S. Tuna Foundation) and consumer advocacy organizations (e.g., the Center for Science in the Public Interest). On each occasion, the NMFS/NOAA position to attempt to outsource the Program activities to the private sector was opposed. Trade associations have encouraged their members to present their written opposition to agency and Department officials and Congressional representatives. The National Fisheries Institute was actively involved in arranging meetings between members and Congressional representatives. It is obvious that industry and consumers oppose having the activities conducted by private contractors and clearly view these activities as inherently governmental functions.

Other Considerations

If a determination is made that the activities of the USDC Seafood Inspection Program are not inherently governmental and actions proceed to privatize these activities, the industry should expect that there will be disruption in the ability of the Program to provide experienced government inspectors within a timeframe that will adequately meet business demands due to the anticipated loss of experienced staff; the difficulty in attracting desirable candidates while the Program is undergoing a study directed toward contracting out its functions; and associated delays in hiring and training. Based on comments made by a number of Program participants, including processors and retailers, industry members will choose to abandon the Program because of the perceived lack of credibility relative to private contractors, and consumers will have less opportunity to obtain seafood with assurance that it is safe, wholesome, properly labeled, and of the quality that they desire.

Summary

The USDC Seafood Inspection Program inspects/certifies approximately 17% of the fishery products consumed in the United States, while also providing inspection and certification of more than 142 million pounds of U.S. exports to meet the requirements of foreign governments and buyers. Sanitation and hygienic practices are evaluated, along with product inspection in approximately 240 processing plants located throughout the U.S., American Samoa, and Puerto Rico. In addition, product lot inspections are conducted for approximately 2500 firms annually. These activities are recognized by the FDA and enhance the assurances that industry and consumers are provided with safe, wholesome, properly labeled products of identified quality.

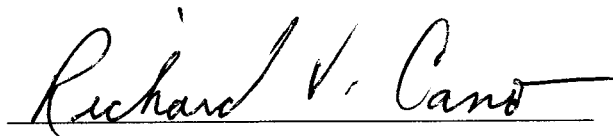
These activities are completely reimbursed through fees charged to the industry for the services rendered. No appropriated funds are provided to this Program and under such conditions the Program should rationally be excepted from consideration under the FAIR Act as a “Nonappropriated funds instrumentality”.

The discretion required to perform these duties and their significance to the industry and consumers toward the maintenance of a secure, safe, wholesome, and properly labeled food supply demonstrate that these are "inherently governmental functions", and thereby are not subject to consideration for contracting out to the private sector.

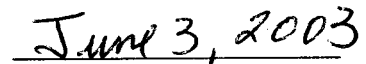
Statutory, economic, and logistical considerations further reinforce that the USDC Seafood Inspection Program was inappropriately identified for inclusion under the FAIR Act and that no benefits would be afforded to the U.S. taxpayer.

The Challenge filed on March 5, 2003 provided the necessary detail to substantiate that the activities of the USDC Seafood Inspection Program should be exempt from outsourcing and are clearly inherently governmental. This Appeal provides additional reinforcement of this conclusion.

Therefore, a Notice should be expeditiously published in the Federal Register advising that the designation of the activities of the USDC Seafood Inspection Program has been changed to reflect its inherently governmental function.

A handwritten signature in cursive script that reads "Richard V. Cano". The signature is written in dark ink and is positioned above a horizontal line.

Richard V. Cano
Acting Director, Seafood Inspection Program
NMFS/NOAA
U.S. Department of Commerce

A handwritten date in cursive script that reads "June 3, 2003". The date is written in dark ink and is positioned above a horizontal line.

Date

List of Attachments

- Attachment A – Challenge; March 5, 2003
- Attachment B – NOAA’s decision regarding the Challenge; May 20, 2003
- Attachment C - Letter of February 3, 2003 from the United States Senate Committee on Health, Education, Labor, and Pensions to Mitchell Daniels, Director, OMB
- Attachment D – Letter of March 20, 2003 from Congressman Barney Frank to the Secretary of Commerce, Donald Evans
- Attachment E – Letter of April 8, 2003 from Senator Susan Collins (Chairman of the U.S. Senate Committee on Governmental Affairs) to Under Secretary Lautenbacher
- Attachment F – *NFInsider* (newsletter), page 1, April 4, 2003
- Attachment G – *NFInsider* (newsletter), pages1-2, May 23, 2003
- Attachment H – Letter of May 9, 2003 from Bob Jones (Executive Director, Southeastern Fisheries Association to Secretary of Commerce, Donald Evans (E-mail copy)
- Attachment I – *Wave* article, March 25, 2003
- Attachment J – *Wave* editorial, March 26, 2003
- Attachment K – *Wave* editorial, May 23, 2003
- Attachment L - *Wave* article, May 28, 2003
- Attachment M – Letter of March 19, 2003 from Dr. Richard Zurbrigg (Director, Fish, Seafood and Production Division, CFIA) to Richard Cano (Acting Director, Seafood Inspection Program, USDC)

Attachment A

Challenge

March 5, 2003



SEAFOOD INSPECTION PROGRAM
U.S. DEPARTMENT OF COMMERCE
1315 EAST-WEST HIGHWAY
SILVER SPRING, MARYLAND 20910-3282
USA



March 5, 2003

Ms. Sonya G. Stewart
Chief Financial Officer and
Chief Administrative Officer
National Oceanic and Atmospheric
Administration
1401 Constitution Avenue, N.W.
Room 6811
Washington, D.C. 20230

Dear Ms. Stewart:

I am submitting the attached document under the provisions Section 3 (b)(3) of the Federal Activities Inventory Reform Act of 1998 as a formal Challenge to the NMFS/NOAA decision to list the activities of the USDC Seafood Inspection Program under the FAIR Act inventory as not inherently governmental functions (i.e., commercial activities).

I look forward to your written concurrence that the activities of this fully reimbursable Program are logically concluded to be inherently governmental functions.

Sincerely,

Richard V. Cano
Acting Director
Seafood Inspection Program
NMFS/NOAA/USDC



**Challenge
to the
Listing and Designation of the
USDC Seafood Inspection Program
As a Commercial Activity**

ABSTRACT: The USDC Seafood Inspection Program is a fully reimbursable program that inspects/certifies approximately 17% of the fishery products consumed in the United States, while also providing inspection and certification of more than 142 million pounds of U.S. exports to meet the requirements of foreign governments and buyers. Sanitation and hygienic practices are evaluated, along with product inspection in approximately 240 processing plants located throughout the U.S., American Samoa, and Puerto Rico. In addition, product lot inspections are conducted for approximately 2500 firms annually. This Challenge demonstrates that the Program: 1) is exempted from consideration under the FAIR Act because it is a “Nonappropriated funds instrumentality” in that it does not use any appropriated funds; and 2) performs inherently governmental functions to the benefit of industry and consumers. In addition, statutory, economic, and logistical considerations further reinforce that the USDC Seafood Inspection Program was inappropriately identified for inclusion under the FAIR Act, and that no benefits would be afforded to the U.S. taxpayer while significant disruption and additional costs could be experienced by affected industry members.

CHALLENGE

The following Challenge is being submitted under the provisions of Section 3 (Challenges to the List) of the Federal Activities Inventory Reform Act of 1998 (subsequently referred to as the FAIR Act). The FAIR Act states, in part,:

Sec. 3. CHALLENGES TO THE LIST

- (a) Challenge Authorized.—An interested party may submit to an executive agency a challenge of an omission of a particular activity from, or an inclusion of a particular activity on, a list for which public availability has been published under section 2.
- (b) Interested Party Defined.—For the purposes of this section, the term “interested party”, with respect to an activity referred to in subsection (a), means the following:
 - (1)....
 - (2)....
 - (3) An officer or employee of an organization within an executive agency that is an actual or prospective offeror to perform the activity.

I, Richard V. Cano, have been continuously employed since December 1980 by the Seafood Inspection Program (and its predecessor organizational titles) located in the National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA) of the U.S. Department of Commerce (USDC). I am the Deputy Director, currently functioning as the Acting Director, of the Seafood Inspection Program. In this capacity, I am filing this Challenge to the agency’s decision to list and designate the USDC Seafood Inspection Program (Program) as a commercial activity for the following reasons:

Exception under the FAIR Act

Section 4 of the FAIR Act addresses applicability of the Act and identifies the agencies that are covered under the Act, as well as exceptions to which the Act does not apply.

Sec. 4. APPLICABILITY

(b) Exceptions.—This Act does not apply to or with respect to the following:

(1)....

(2)....

(3).Nonappropriated funds instrumentality....

The reason for such an exception is evident in that a purpose of the FAIR Act is to identify activities in the federal government that are not inherently governmental functions (i.e., commercial activities) and that such commercial activities may be considered for contracting out to the private sector. The ultimate purpose for contracting out such activities is to reduce the costs of Government to the benefit of U.S. taxpayers. Therefore, it is logical that programs that do not receive appropriated funds (i.e., tax dollars) should be excluded from the scope of the FAIR Act and subsequent processes.

NOAA provides a succinct description of the FAIR Act and the subsequent A-76 process under its website entitled “A-76 Studies, Frequently Asked Questions”

(<http://www.ofa.noaa.gov/~audit/noaa/A-76faq.htm>), which includes the following statements:

...The Federal Activities Inventory Reform (FAIR) Act of 1998 requires federal agencies to submit to the Office of Management and Budget (OMB) an annual list of activities performed by government employees that, in the judgement of the agency head, are not inherently governmental functions. OMB requires agencies to conduct A-76 competitions on a percentage (*sic*) of their commercial functions each year.

...The goal of the A-76 process is to improve efficiency and reduce costs to the taxpayer. (emphasis added)

The USDC Seafood Inspection Program is authorized under the Agricultural Marketing Act of 1946 (7 USC 1621-1627) which, among other things, established that the programs be voluntary and able to collect fees to cover costs:

§ 1622 (h) ... under such rules and regulations as the Secretary of Agriculture may prescribe, including assessment and collection of such fees as will be reasonable and as nearly as may be to cover the cost of the service rendered, to the end that agricultural products may be marketed to the best advantage, that trading may be facilitated, and that consumers may be able to obtain the quality product which they desire, except that no person shall be required to use the service authorized by this subsection.

Under § 1626, “agricultural products” is defined to include “fish and shellfish, and any products thereof, including processed and manufactured products...”. The inspection of fish and shellfish and the products thereof was transferred to the U.S. Department of Commerce in 1970 (16 U.S.C. 742(e) and Reorganization Plan 4 (23 F.R. 2304, 35 F.R. 15627), 1970).

The USDC Seafood Inspection Program is fully funded through the fees that are assessed and collected from the industry members that participate in the Program. No appropriated funds are used to support this Program. In addition, the Program actually contributes approximately \$1.6 million annually to NMFS and NOAA in overhead costs, thus reducing these agencies' appropriated funds needs.

Therefore, under Sec. 4. (b)(3) of the FAIR Act, as a "Nonappropriated funds instrumentality", the Program is excepted and does not fall under the scope of the Act. This position is supported by the legal opinion (see Attachment A) of the senior attorney in the Office of General Counsel for NOAA Fisheries. This attorney has previous experience with the General Accounting Office (GAO) and is the primary legal resource for the Program. He is intimately familiar with the responsibilities and functions of the Program, as well as the responsibilities and functions of other food inspection programs of the Food and Drug Administration (FDA) and the U.S. Department of Agriculture (USDA).

Inherently Governmental Functions

In addition to the USDC Seafood Inspection Program being excepted from consideration under Sec. 4. (b)(3) of the FAIR Act, as a "Nonappropriated funds instrumentality", it is further inappropriate to identify the Program for consideration for contracting with a private source because the Program's activities are inherently governmental functions.

The FAIR Act ([Page 112 STAT. 2382], Public Law 105-270, 105th Congress) is:

An Act

To provide a process for identifying the functions of the Federal Government that are not inherently governmental functions,...

Section 5 of the FAIR Act provides definition and criteria for determining "inherently governmental function". The following extracts of this Section are germane to the functions of the USDC Seafood Inspection Program:

(2) Inherently governmental function.—

(A) Definition.--The term "inherently governmental function" means a function that is so intimately related to the public interest as to require performance by Federal Government employees.

(B) Functions included.--The term includes activities that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements. An inherently governmental function involves, among other

things, the interpretation and execution of the laws of the United States so as—

(i) to bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;

(ii) to determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;

(iii) to significantly affect the life, liberty, or property of private persons;

(iv) to commission, appoint, direct, or control officers or employees of the United States; or

The USDC Seafood Inspection Program routinely evaluates the safety, wholesomeness, proper labeling, and quality of fish and fishery products, as well as determining the adequacy of sanitation and hygienic practices of the processing facility and the safety of the processes used in the manufacture of the food. These functions are equivalent to the functions performed by the inspection personnel of USDA and FDA toward ensuring that the consumer is provided with safe, wholesome, properly labeled food of acceptable quality. It should be noted that both USDA and FDA have determined these functions to be inherently governmental. The USDA has also determined that the inspectors at the USDA Animal and Plant Health Inspection Service (APHIS) are inherently governmental.

In order to perform the duties assigned, USDC Inspection staff must possess the knowledge and experience necessary to evaluate the public health risks associated with the raw material, ingredients, manufacturing process, and finished product of the numerous fishery products that are produced and distributed in the United States, and/or imported or exported by the United States. In addition to the public health issues, USDC inspectors must understand and interpret the appropriate food laws and regulations of the United States to make judgements regarding the wholesomeness of the product and whether this may be adversely impacted by the sanitation and hygienic practices of the processing facility and/or the process employed in the manufacture of the food. Further, assessments must be made of the labeling that is associated with process, ingredients, and finished product to determine compliance with Federal food labeling laws and regulations. In the case of products which will be evaluated for compliance with quality specifications or U.S. Standards for Grades, the inspector must also determine if the product conforms to the established criteria before granting the use of an Official Mark (e.g., U.S. Grade A, Processed Under Federal Inspection, USDC Lot Inspected, USDC Accepted Per Specifications). These actions require the inspector, who is routinely acting alone, to exercise appropriate discretion in making decisions for the Federal Government regarding the significance of the issue or adverse finding in order that the firm is held to the proper level of control, the cost associated with the manufacture of the product is neither unnecessarily elevated

nor reduced, and that the buyer/consumer is assured that the product is safe, wholesome, properly labeled, and of the indicated quality.

In addition to conducting these functions throughout the United States, the USDC Seafood Inspection Program performs evaluations of the sanitation and hygienic practices of foreign manufacturing facilities and the control systems that they utilize at the request of U.S. importers or the foreign firms to demonstrate that they are in compliance with U.S. requirements (e.g., FDA HACCP regulation 21 CFR Part 123).

The commonality in activities and the qualifications of USDC inspection personnel and those of the FDA is further reinforced through determination by the Office of Personnel Management (OPM) that USDC inspection personnel would use the same employment series as FDA inspection personnel; namely, Consumer Safety Officers and Consumer Safety Inspectors.

The USDC Seafood Inspection Program also provides inspection and certification support to USDA food programs that utilize fishery products (i.e., School Lunch Program; surplus commodity buys). USDC inspection and certification under these programs attest that the product has been formulated to provide the required nutritional composition for use in schools and/or meets USDA procurement requirements including safety, wholesomeness, quality, labeling, and packaging.

USDA and USDC provide the Department of Defense (DOD) with a Food Product Evaluation Team composed of product specialists from the two civilian agencies to evaluate samples from products that have been purchased by DOD under its Prime Vendor Program. These products are destined for military troop feeding and are evaluated for compliance with DOD contract requirements that include origin, product identity, wholesomeness, quality attributes, labeling, and packaging. DOD may use the results of these audits to determine the acceptability of the specific shipment that was sampled by DOD and the results of combined audits to determine whether a continued relationship with the Prime Vendor is warranted.

Additional inherently governmental functions performed by the USDC Seafood Inspection Program are illustrated in the following areas:

Memorandum of Understanding between FDA and USDC

A Memorandum of Understanding (MOU) has existed between the FDA and USDC since January 17, 1975 “Relative to Inspection Programs for Fishery Products”. The following excerpts from this MOU demonstrate the common goals of the FDA and the USDC Seafood Inspection Program, as well as the interaction of the agencies, in order to better assure the safety, wholesomeness, and proper labeling of fishery products for the benefit of the public:

...The agreement, which sets forth the working arrangements being followed or adopted in the interest of the public so that each agency will discharge as effectively as possible its inspection and standardization activities for fish and fishery products,...

...Department of Commerce, under authorities established by the Agriculture Marketing Act and the Fish and Wildlife Act is responsible for (1) the development and advancement of commercial grade standards for fishery products and better health and sanitation standards in the industry and (2) furnishing inspection, analytical, and grading services and issuing certificates to producers, processors, shippers, receivers, or interested parties. Its major purpose is to encourage and assist the industry in improving the quality and safety of its products, and to provide objective information by means of inspection and official certification...

A. The National Marine Fisheries Service will:

1.-4. ...

5. Decline to inspect, grade, certify, or permit the use of official grade marks or other approved identification, except Retained Tags, on a food product which is considered adulterated or misbranded under the Federal Food, Drug, and Cosmetic Act of such type and/or in such amounts as to result in the food product being subject to regulatory action by FDA. NMFS will make such examinations and tests as are reasonably feasible for those materials and substances that would be likely to contaminate the product.

6. Report to the appropriate FDA field office information concerning any product that has been placed under official retention by NMFS because it is suspected, or known to be adulterated, or misbranded under the Federal Food, Drug, and Cosmetic Act, of such type and/or in such amounts so as to result in the food product being subject to regulatory action by FDA, unless such food product is so reconditioned as to comply with FDA requirements or is segregated and disposed of for non-food use or otherwise lawfully shipped or sold.

7. Decline to inspect or grade samples of product which are the subject of seizure, prosecution, injunction, or import detention action. This does not preclude reinspection of samples legally collected for that purpose by NMFS, if the FDA seizures or other actions involve products which have previously been inspected or graded by NMFS.

8. Participate in a cooperative effort in investigations of food poisoning, product recalls, and problems concerning food contamination caused by disasters or other phenomena involving foods where both agencies have mutual obligations.

9.-10. ...

B. The Food and Drug Administration will:

1. Recognize that the NMFS service provided in connection with the voluntary contract inspection of fishery processing establishments contributes to protection of consumers and aids FDA in enforcement of pertinent statutes. ... The NMFS inspection service will not diminish FDA's authority to inspect but should minimize FDA inspections in establishments under NMFS contract inspection. In this regard, NMFS inspectors shall routinely notify contract establishments of pertinent FDA requirements, advise them on how to comply and verify compliance. NMFS inspectors may not act as FDA inspectors but their inspections and consultations with FDA should reduce the necessity for FDA inspections.

2.-7. ...

8. Invite the NMFS inspector assigned to a processing plant which is operating under NMFS contract inspection to participate with the FDA inspector during his inspection of

such plant. The FDA and NMFS inspectors shall discuss any conditions noted which may result in violations of law.

C. It is mutually agreed that:

1. Where either agency believes that a particular violation is occurring in several fish processing plants in the industry, it may request a meeting with the other agency to consider steps to investigate the situation immediately and, where necessary, to take mutually agreeable action, ...

2. Both agencies will participate in periodic joint meetings, and with industry as appropriate, to promote better communication and understanding of regulations, policy, and statutory responsibilities, to improve sanitation and food-handling practices in processing establishments, and to serve as a clearinghouse for questions and problems as may arise.

3. ...

4. Both agencies will exchange data and cooperate in the development of sampling plans methodology, and guidelines for determining unavoidable natural and environmental defects common to fish and fishery products.

5. ...

6. Formal training courses sponsored by either agency will be available whenever possible for the other's personnel.

7.-11. ...

The activities outlined in these excerpted segments of the MOU clearly demonstrate the inherently governmental functions that are conducted by the USDC Seafood Inspection Program for the benefit of the industry and consumers. Interaction between the FDA and USDC has expanded since the implementation of this MOU in 1975 and the spirit of the MOU has resulted in a number of activities (e.g., the development of HACCP procedures, and EU certification) that have strengthened the rapport between the agencies. Both agencies recognize that the current MOU should be revised to better reflect the expanded activities of the respective agencies, as well as to further delineate additional areas where recognition and cooperation can further enhance the benefits afforded to the public.

A Critical Function under the NOAA Continuity of Operations Plan

Under Presidential Decision Directive 67 (Ensuring Constitutional Government and Continuity of Government Operations) requires all Federal departments and agencies to have a viable continuity of operations capability. The Continuity of Operations Plan (COOP) for NOAA "ensures the continuance and uninterrupted delivery of critical services to the public, other Federal agencies, clients, and NOAA personnel which are necessary to enable us to comply with existing statutes, executive orders, and mandates...".

NMFS and NOAA have identified the Seafood Inspection Program to be a "critical function that must be re-established within the first 12 hours" after an incident (e.g., national emergency). Critical functions are defined as:

...functions or operations, that are required to be performed by statute or Executive Order to provide vital services, exercise civil authority, maintain the safety and well being of the general populace, and/or sustain the nation's industrial and economic base in an emergency, or other functions deemed essential by the heads of principal organizational elements.

It is reasonable to conclude that the nature of such functions must be considered to be inherently governmental.

Therefore, it is inconceivable how NMFS/NOAA can in one sense consider the USDC Seafood Inspection Program to be a "critical function", while simultaneously under the FAIR Act conclude that it is not inherently governmental, but rather commercial, and thereby should be contracted out to the private sector.

Member of the Interagency Food Working Group

The USDC is among the Federal agencies that compose the food regulatory framework in the United States. The primary reason for its inclusion is the presence of the Seafood Inspection Program. The events of September 11, 2001 demonstrated that the United States is vulnerable domestically to terrorist attacks. Until this event the Federal agencies involved in food were primarily focused on food safety due to processing or distribution failures. Now, the Federal agencies must expand their consideration from traditional food safety issues to food defense and the possibilities of significant intentional contamination threats.

Vulnerability assessments have resulted in the Administration's determination to ensure that appropriate actions are taken to protect the Nation's food supply. As part of this effort, the Interagency Food Working Group was formed. Its Charter contains the following statements:

The Homeland Security Council (HSC) will assemble an interagency food working group (IFWG) to develop an interagency effort to protect the food supply and minimize it as a target. The length of the IFWG is dependent upon its findings while preparing the strategic plan.

Under National Security Presidential Directive (NSPD) 17, the federal government is directed to pursue a new strategy to counter the threats from weapons of mass destruction. As one part of this strategy, NSPD 17 called for improved interagency coordination. The October 8, 2001 Executive Order establishing the Office of Homeland Security directed the office to coordinate efforts among federal, state, and local entities and the private sector for preventing, preparing for, and responding to terrorist attacks on the United States. Public Law 107-296, establishing the Department of Homeland Security, also established the Homeland Security Council within the Executive Office of the President with one role being to ensure coordinated homeland security efforts. In conjunction with these materials, in February 2003, the HSC will release its *National Strategy for the Physical Protection of Critical Infrastructures and Key Assets*. In

conjunction with the authorities listed above, this working group will prepare a strategic plan for protecting the food sector.

Among the areas to be addressed is:

Preparedness and Response Preparedness will require the federal agencies to establish interagency procedures and processes for responding to incidents. This infrastructure will facilitate response efforts should the food supply experience a terrorist attack.

It would be logical and reasonable to believe that these activities and functions that the USDC Seafood Inspection Program will participate in are inherently governmental functions.

Statutory, Economic, and Logistical Considerations

Although the reasons presented under the sections “Exception under the FAIR Act” and “Inherently Governmental Functions” provide clear evidence and rationale that it is inappropriate to conclude that the USDC Seafood Inspection Program should be listed as a commercial activity, other issues such as statutory, economic and logistical considerations further reinforce that it is improper, counterproductive, and contrary to logic to subject the Program to A-76 procedures.

Statutory Consideration

As explained in the attached legal opinion, USDC relies on the enabling legislation of the Agricultural Marketing Act of 1946 to provide for inspection and certification activities. At the time of passage of the Act, these activities were centered in USDA. Subsequently, through various statutes, the authorities for providing voluntary inspection and certification functions for fish and fishery products were transferred to USDC. However, USDA continues to utilize these authorities for other commodities and has taken the position that its food safety and inspection programs are inherently governmental functions, and as such, are not suitable for FAIR Act consideration. The Program’s legal counsel advises that “To avoid potential inconsistency in interpreting our shared statutory authority, I believe any decision to list DOC’s inspection program under the FAIR Act inventory should only be made with the prior concurrence of the Secretary of Agriculture.”

As previously noted in the “Exception under the FAIR Act” section of this paper, the Agricultural Marketing Act provides for the “... assessment and collection of such fees as will be reasonable and as nearly as may be to cover the cost of the service rendered...”. It would be unreasonable and therefore contrary to the provisions of the Act to have participants of the USDC Seafood Inspection Program bear any additional costs associated with an A-76 study.

The Agricultural Marketing Act requires the Federal government to set fees that are, by its own definition, “reasonable” and “cover the costs.” This language is designed to apply to a reimbursable program with a National (inherently governmental) mandate, and is not compatible with outsourcing. Whatever the outcome of the A-76 source selection, the Federal government must continue to set fees that are both nondiscriminatory and in the public interest; however, a

contractor would want to maximize revenues by charging what the traffic will bear. A contractor would also not have any incentive to cut costs for any service it provides if the government will then reduce the fees it can charge to comply with the Agricultural Marketing Act. A contractor would be unlikely to even submit a bid unless guaranteed a desired profit in a cost-plus contract for each type of service. This would make any A-76 cost comparison biased, unreliable, and inconsistent with the Agricultural Marketing Act.

Economic Consideration

As noted above the costs associated with conducting the A-76 study would not be borne by the reimbursable Seafood Inspection Program and therefore would need to come from the appropriated (i.e., taxpayer) funds of NMFS/NOAA/USDC. The estimated costs for conducting such a study is placed at approximately \$2,500 per person considered for competition with the private sector. NMFS/NOAA has identified the activities of 157 USDC Seafood Inspection Program employees for the A-76 study, yielding a projected cost of approximately \$392,500. If a fundamental purpose of the FAIR Act and subsequent actions is to reduce the costs of government and thereby save the taxpayers' money, how is it to the taxpayers' benefit to have a function that costs the taxpayer nothing, be subjected to a study that will cost the taxpayer \$392,500?

In the event that the activities of the 157 positions in the Seafood Inspection Program are contracted out to the private sector, certain employees would be entitled severance pay. After removing those employees that would be eligible for immediate annuity through either (1) Optional Retirement or (2) Discontinued Service Retirement and therefore not eligible for severance pay, the estimated severance pay for eligible employees would amount to approximately \$1.8 million. According to information provided by NOAA Human Resources, severance pay would be paid out of NOAA appropriated funds. Again, for a Program that currently costs the taxpayer nothing, the taxpayer will now be obligated to pay an additional \$1.8 million. How is this action to the benefit of taxpayers?

It was previously noted that the USDC Seafood Inspection Program actually contributes approximately \$1.6 million annually to NMFS and NOAA in overhead costs that reduce these agencies' appropriated funds needs. Would the same level of support be realized if these activities are contracted to the private sector, or would the taxpayer find that additional funds were necessary to support NMFS/NOAA administrative functions?

Logistical Considerations

Participants of the USDC Seafood Inspection Program utilize the inspection and certification services because they are rendered by impartial government employees. Certification to some domestic buyers and export certification to certain foreign countries require that the inspection/certification functions be performed by governmental personnel. In the event that the activities of the Program are contracted out to the private sector, the following results could occur:

- (1) certain domestic buyers may choose to end their participation in the Program;
- (2) additional federal staff would need to be retained in order to provide inspection/certification to meet buyer requirements or foreign country requirements.

In both cases these conditions would result in increased costs to provide the inspection services. In the first case, the smaller number of participants would mean that the fixed costs (e.g., support costs, costs of office space, etc) would be spread over a smaller base resulting in higher individual costs. In the second case, the costs of the inspection services would be higher and more disruptive to industry production schedules than currently because some functions would be performed by a private contractor whereas others would need to be performed by a governmental employee (i.e., instead of inspection needs being handled by one individual it would take two).

In order to address the inspection requests received from industry in a timely and cost effective manner, the Program maintains agreements with USDA and 16 States. Under these agreements, cross-licensed USDA and State inspectors are trained by USDC to inspect/certify certain fishery products on behalf of the Federal Government. USDC reimburses USDA or State from the fees that are collected from industry for the services rendered. These cooperative activities result in better utilization of the Federal and State resources to the benefit of the industry and consumers. Such cost effective relationships would cease to exist or, at the very least, be adversely affected under private sector contract(s).

Summary

The USDC Seafood Inspection Program inspects/certifies approximately 17% of the fishery products consumed in the United States, while also providing inspection and certification of more than 142 million pounds of U.S. exports to meet the requirements of foreign governments and buyers. Sanitation and hygienic practices are evaluated, along with product inspection in approximately 240 processing plants located throughout the U.S., American Samoa, and Puerto Rico. In addition, product lot inspections are conducted for approximately 2500 firms annually. These activities are recognized by the FDA and enhance the assurances that industry and consumers are provided with safe, wholesome, properly labeled products of identified quality.

These activities are completely reimbursed through fees charged to the industry for the services rendered. No appropriated funds are provided to this Program and under such conditions the Program is excepted from consideration under the FAIR Act as a “Nonappropriated funds instrumentality”.

The discretion required to perform these duties and their significance to the industry and consumers toward the maintenance of a secure, safe, wholesome, and properly labeled food supply demonstrate that these are “inherently governmental functions”, and thereby are not subject to consideration for contracting out to the private sector.

Statutory, economic, and logistical considerations further reinforce that the USDC Seafood Inspection Program was inappropriately identified for inclusion under the FAIR Act and that no benefits would be afforded to the U.S. taxpayer.

Therefore, a Notice should be expeditiously published in the Federal Register advising that the designation of the activities of the USDC Seafood Inspection Program has been changed to reflect its inherently governmental function.

Richard V. Cano
Acting Director, Seafood Inspection Program
NMFS/NOAA
U.S. Department of Commerce

Date

Attachment A
Legal Opinion of James W. Peaco
Senior Attorney, Office of General Counsel for NOAA Fisheries



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

January 24, 2003

MEMORANDUM FOR: F/SI - Richard Cano

FROM: GCF - *James Peaco*
James Peaco

SUBJECT: Seafood Inspection Program FAIR Act Exemption

I recommend a legal opinion be requested from the Department of Commerce Office of General Counsel (DOC/GC) on: (1) whether the Seafood Inspection Program (SIP) qualifies for a statutory exemption from inclusion on the Federal Activities Inventory Reform (FAIR) Act listing; (2) the determination that SIP functions remain "inherently government" (consistent with the Department of Agriculture's (USDA) interpretation of the same statute implementing the SIP); and (3) the determination any cost associated with implementing the FAIR Act process cannot be used to increase fees imposed upon inspection program participants. I believe the SIP should not be subject to the FAIR Act process. However, DOC/GC has the authority and responsibility for the official resolution of these issues.

Under its authorizing legislation, the Department of Commerce (DOC) Seafood Inspection Program is exempt on two grounds from being listed as an activity for listing under the Federal Activities Inventory Reform Act (Public Law 105-270). First, it qualifies as a nonappropriated fund entity under section 4(b)(3) of the FAIR Act. Second, the functions performed by SIP personnel have always been considered by NOAA and DOC to be "inherently governmental" in nature long before the recent attention given to food safety and bio-terrorism.

A fundamental principle of the FAIR Act is to discourage the federal government from using appropriated or taxpayer funds to produce goods or services already commercially available. This is based upon a concept that Federal funds should not be used by agencies to engage in activities that unfairly compete with private sector businesses that can provide the same services. SIP operations are paid for by the use of nonappropriated funds received from voluntary participants. Participants voluntarily pay for SIP services because the USDC services or benefits they need or desire are **not** commercially available. SIP services are purchased because they are rendered by impartial government employees. These services are in great demand by private sector participants and governmental entities (domestic and foreign) for that reason. Even with personnel restrictions, last year the SIP generated income of about \$1.6 million for NOAA/NMFA through the imposition of administrative fees which the program paid.

Since the SIP does not rely upon the use of appropriated or taxpayer's funds, underlying FAIR Act goals such as saving money or preventing unfair competition cannot be addressed by a SIP



listing. The funding mechanism for the SIP is authorized by law and was not created by Executive agency fiat. The provisions of 7 U.S.C. 1622(h) specifically require the primary source of SIP funding be nonappropriated funds supplied by **reasonable** fees imposed upon its users. It would be unreasonable to charge SIP participants any additional increased costs associated with proposing a FAIR Act inventory listing in order to give NOAA/NMFS an illusory benefit that it is in compliance with the Act.

The Department of Commerce does not have an independent statutory authority to operate its fishery products inspection program. Reorganization Plan No. 4 of 1970 (84 Stat. 2090) transferred the operation authority under various statutes to Commerce to conduct inspection programs. The Department of Agriculture's powers under the Agricultural Marketing Act of 1946, as amended, are still used by both agencies to conduct food safety and inspection programs. Agriculture's inspection programs are funded under **both** appropriated and nonappropriated funds. However, Agriculture has not considered its inspection functions to be suitable for FAIR Act consideration. To avoid potential inconsistency in interpreting our shared statutory authority, I believe any decision to list DOC 's inspection program under the FAIR Act inventory should only be made with the prior concurrence of the Secretary of Agriculture.

Attachment B

NOAA's decision regarding the Challenge

May 20, 2003



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NOAA FINANCE AND ADMINISTRATION

RECEIVED
MAY 20 2003

Mr. Richard Cano
Acting Director for Seafood
Inspection Program
1315 East West Highway
Silver Spring MD 20910-3282

Dear Mr. Cano:

This responds to your challenge to the third release of the FY 2002 Federal Activities Inventory Reform (FAIR) Act Inventory. These challenges advance two reasons for removing the Seafood Inspection Program (SIP) from the list of "commercial" activities: (1) exemption under the FAIR Act and (2) inherently governmental function.

(1) Exception under the FAIR Act

The FAIR Act of 1998 provides a process for identifying the functions of the Federal Government that are not "inherently governmental." These activities may be included on an annual list of government activities that are subject to a cost comparison to determine whether a private contractor or the executive agency shall provide those services.

Section 4 (b) (3) of the FAIR act states that it "does not apply to or with respect to" a "nonappropriated funds instrumentality" if "all the employees of that part of the department or agency are employees referred to in section 2105(c) of Title 5, United States Code." Title 5, Part III, Subpart A, Chapter 21, Sec. 2105(c) refers to an "employee paid from nonappropriated funds of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the armed forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the armed forces"

None of the employees of the NMFS Seafood Inspection Program (SIP) that were identified in the release of the FY 2002 FAIR Act inventory fit within the parameters of that definition. We do not believe that definition of "employees" can be reasonably interpreted more broadly, and still remain in compliance with the provisions and spirit of Title 5, United States Code.

(2) Inherently Governmental Function



Attachment A to OMB Circular No. A-76 (Revised) states that "agencies shall presume all activities are commercial in nature unless justified as inherently governmental in accordance with paragraph E." This paragraph further indicates that "not every exercise" of discretion is evidence that an inherently governmental activity is involved.

The Office of Federal Procurement Policy (OFPP) Policy Letter 92-1, "Inherently Governmental Functions" of September 23, 1992, explains that "determining whether a function is an inherently governmental function often is difficult and depends upon an analysis of the facts of the case." This letter explicitly identifies "the approval, of Federal licensing actions and inspections" as an "inherently governmental function"; however, it also states that "contractors' providing inspection services" is among those "services or actions that are not considered to be an inherently governmental functions."

Although some of the functions of the SIP may arguably be construed as "inherently governmental," for example, supervisory roles, others may not. Considering legislative restrictions and authorizations and the need to exercise substantial discretion, supervisory SIP activities have characteristics that are "inherently governmental." Other SIP activities, such as those involving purely technical or scientific tasks, could be specified in the terms of a contract. Performance could be monitored to ensure that appropriate agency control is preserved. Outsourcing these "commercial" activities might be determined to be impractical because of the amount of oversight required and related logistical and financial problems, or that the program is currently being administered in the most cost-effective manner. Nevertheless, these considerations do not preclude a direct cost comparison under OMB Circular No. A-76 (Revised.) to reach such a determination.

In conclusion, NOAA will not change the designation of the activities of the USDC Seafood Inspection Program. The Department of Commerce and NOAA's General Counsel has also upheld NOAA's decision on the coding of the above positions as commercial in nature. Your office may appeal this decision within 10 working days after receiving this written notification.

Sincerely,



Helen Hurcombe
Acting Chief Financial Officer/
Chief Administrative Officer

Attachment



UNITED STATES DEPARTMENT OF COMMERCE
Office of the General Counsel
Washington, D.C. 20230

ATTORNEY-CLIENT PRIVILEGED

Date: May 5, 2003

To: Jane Chalmers, Esq.
NOAA Office of General Counsel

From: Mark Langstein, Acting Chief
Contract Law Division *Mark Langstein*

Subject: Commercial Activities Inventory Challenge
National Weather Service

I am responding to your request for advice as to whether the three administrative challenges to NOAA's classification its Seafood Inspection Program (Program) as a commercial activity should be granted. In our opinion NOAA's proposed response denying the challenges is proper.

There are three main predicates for the challenges. The first basis alleges that the Program is excepted from the Federal Activities Inventory Reform (FAIR) Act coverage in that it falls under the Act's Section 4 exception for non-appropriated funds instrumentalities.⁹ The second basis alleges that because the Program inspectors perform inherently governmental duties the Program is inappropriately classified as a commercial activity. The final basis for challenge alleges that classification of the Program as a commercial activity is inconsistent with the manner in which USDA classifies its inspectors performing similar duties. We will examine each allegation in turn.

The challengers allege that the Program is not subject to the FAIR Act coverage in that Congress appropriates no funds for its performance, it is funded completely by payments received from entities undergoing inspection and that therefore it falls under the exception carved out by Section 4(b)(3) for non-appropriated funds instrumentalities (NAFIs). Regardless of whether or not the Program is properly classified as a NAFI, it is clear that it nevertheless is not excepted from the Act's provisions. Section 4(b)(3) of the Act limits the exception to all or part of a department or agency if all of its employees fall within the coverage of 5 U.S.C. § 2105(c). That provision encompasses, in pertinent part:

An employee paid from nonappropriated funds of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the armed forces....

It is plain that the employees of the NMFS Seafood Inspection Program neither qualify as employees of the designated uniformed services entities nor any other instrumentality of the United States under armed forces jurisdiction. Hence, the Program is clearly not excepted from FAIR Act coverage by § 4(b)(3).

The challenges next maintain that the Program functions should be classified as inherently governmental in that the functions "determine, protect and advance [the United States'] economic, political, territorial, property or other interests," "significantly affect the life, liberty, or property of private persons" and that Program inspectors exercise discretion such that the function should not be classified as commercial.

Appendix 5 to the Revised Supplemental Handbook to OMB Circular A-76 (Office of Federal Procurement Policy Letter 92-1) ("Appendix") establishes Executive Branch Policy relating to identifying those functions that should be classified as inherently governmental. Section 5 of the Appendix defines an inherently governmental function as

...a function that is so intimately related to the public interest as to mandate performance by Government employees. These functions include those activities that require either the exercise of discretion in applying Government authority or the making of value judgements in making decisions for the Government. Governmental functions normally fall into two categories: (1) the act of governing. i.e. the discretionary exercise of Government authority, and (2) monetary transactions and entitlements.

Although the seafood inspectors' actions can affect the lives of private persons, the impact needs to be significant. In this regard many functions performed by the Government with potential or actual impact on the lives of private persons are already performed by contractors. For instance, the NESDIS SARSAT US Mission Control Center serving a critical function in the rescue of persons from perilous circumstances is performed by a contractor. The operation of many of the Department of Energy's large facilities is performed by contractors. Cleanup of hazardous waste sites and response to oil and chemical spills are routinely performed by contractors. These functions, although often performed by contractors, have the potential to significantly affect the lives of private persons equally with the seafood inspection function. Accordingly, we do not believe that the seafood inspection functions rise to the level of "significantly affect[ing] the life, liberty, or property of private persons," and thus are not exempt from public/private competition on that basis.

The challenge goes on to maintain that these individuals exercise discretionary authority during the course of their inspection activities. This, the challenge maintains, falls under the Appendix Section 7(a) guideline that an indicia of an inherently governmental function is exercise of substantial discretion that has "the effect of committing the Federal Government to a course of action when two or more alternative courses of action

exist.” However as Section 7 also warns, not every exercise of discretion is evidence that such a function is involved.

In our opinion the type of discretion here at issue does not rise to the level of an inherently governmental function. Appendices A and B to the Appendix list examples of activities that either are (Appendix A) or border on (Appendix B) being inherently governmental in character. Although Appendix A, at Paragraph 15, declares that the “approval of Federal licensing actions and inspections” is considered inherently governmental, Paragraph 17 of Appendix B specifically includes “[c]ontractors providing inspection services” among those pursuits that are subject to Circular competition. Although no examples of “inspection services” are provided and they are not otherwise defined, there is no reason to believe that the services here challenged would not be encompassed under the Appendix B criterion.¹ In sum, the positions at issue do not “include those activities that require either the exercise of discretion in applying Government authority or the making of value judgements in making decisions for the Government” and are properly classified as commercial in character.

Finally, the challenges allege that because USDA has classified its inspectors as inherently governmental, the Department should do the same. In support of this contention, challenger AFG points to Paragraph G(3) of Appendix 2 of the Revised Supplemental Handbook to the Circular. That provision sets forth as one of the permitted bases for challenge an allegation that the activity classification has previously been “established by precedent (such as when other agencies have contracted for the activity or undergone comparisons for this or similar activities).”

Although the Revised Supplemental Handbook permits a challenge on the basis of precedent, it does not require that precedent be controlling upon the classification authority. Thus, there is nothing inherently unlawful with different agencies treating similar functions differently. Indeed, Section 7(b) of the Appendix, declares:

Totality of the circumstances. Determining whether a function is an inherently governmental function often is difficult and depends upon an analysis of the facts of the case. Such analysis involves consideration of a number of factors, and the presence or absence of any one is not in itself determinative of the issue. Nor will the same emphasis necessarily be placed on any one factor at different times, due to the changing nature of the Government’s requirements.

Thus, the same function in the same agency may, at different times, be classified differently. It is not therefore surprising that a similar function may be classified

¹ Although not specifically detailed in the information provided, it appears that the contours of the inspection services at issue may be substantially defined by regulation. If so, this limitation on the seafood inspectors’ discretion is another indicia that the instant services are not inherently governmental.

dissimilarly by a different agency. Although the challenge did not present USDA's rationale for classifying its inspectors as inherently governmental the Department's classification of the seafood inspection activity as commercial is in accordance with the applicable guidelines and should be affirmed.²

In conclusion, we concur with NOAA's FAIR Act classification of the disputed positions and recommend that the challenge be denied. However, in accordance with Appendix B to the Appendix, we recommend that the Department scrutinize performance by any contractor to ensure that appropriate agency control is maintained.

² Although unnecessary to the decision on the challenge, it may well be that the functions performed by the USDA inspectors are different or broader than those performed by the Department's seafood inspectors.

Attachment C

Letter of February 3, 2003

from

**The United States Senate Committee on Health, Education, Labor, and
Pensions**

to

Mitchell Daniels, Director, OMB

JUDG GREGG, NEW HAMPSHIRE, CHAIRMAN

RIJ. FIRST, TENNESSEE
MICHAEL B. ENZ, WYOMING
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JAMES M. JEFFORDS II, VERMONT
JEFF BINGAMAN, NEW MEXICO
PATTY MURRAY, WASHINGTON
JACK REED, RHODE ISLAND
JOHN EDWARDS, NORTH CAROLINA
HILLARY RODHAM CLINTON, NEW YORK

SHARON R. SOOENSTROM, MAJORITY STAFF DIRECTOR
J. MICHAEL MYERS, MINORITY STAFF DIRECTOR AND CHIEF COUNSEL

<http://labor.senate.gov>

United States Senate

COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS

WASHINGTON, DC 20510-6300

February 3, 2003

Mitchell Daniels
Director
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Dear Director Daniels:

We are writing to express our strong concerns over the Administration's unprecedented plan to privatize the jobs of 850,000 federal employees – nearly half of the federal workforce. We have deep reservations about privatizing so much of the federal workforce, especially in the absence of a reliable and comprehensive process to determine the cost, quality and scope of the tens of billions of dollars of work already performed by private contractors.

First, we are concerned that OMB's controversial revision of OMB Circular A-76 will undermine public-private competition. Many jobs will be lost without an opportunity for federal employees to compete and demonstrate greater efficiency. The new policy will force agencies to privatize work without competition if agencies fail to meet arbitrary deadlines. With no new in-house resources, it is unlikely that agencies will be able to meet these deadlines. In addition, federal employees are rarely, if ever, allowed to compete for new work or work provided by contractors. As a result, federal employees will have few opportunities to compete fairly for federal work.

We urge you to ensure that no work is privatized without giving federal employees opportunities to compete, and that federal employees are given fair opportunities to compete for new work and work currently provided by contractors.

Second, we are concerned that even when there is competition, the new rules are biased in favor of contractors. The new process emphasizes the use of subjective factors at the expense of objective, cost-based criteria that lead to the best service for customers and the best price for taxpayers. Both cost and quality are essential factors and the competition process should reflect both. Using a process that is cost-based and quality-based ensures that agencies can acquire the services they want, at the quality they need, for the lowest realistic cost.

We urge you to prevent the privatization of the work performed by federal employees without the use of a fair, cost-based public-private competition process.

Third, federal agencies do not have a system in place to hold contractors accountable. There are no mechanisms for tracking the costs and the quality of service contracting. In fact, some agencies served by contractors today do not even know which services are being provided by contractors.

We urge you to ensure accountability by establishing reliable methods to track the cost and quality of work performed by contractors.

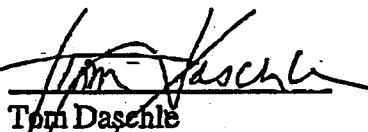
Fourth, the new process is likely to reduce the standard of living for thousands of Americans. Contractors have incentives to reduce costs by providing inferior compensation packages for those who perform government work, and displaced federal workers are likely to lose their jobs, their health care, and their security for the future. Good jobs with fair wages and opportunities for advancement become lower-wage jobs with no benefits and no security.

We urge you to establish objective measures for public-private competition that ensure fair wages and benefits.

Cost-based public-private competitions that explicitly take into account quality can be effective -- if they are used responsibly for current work conducted by federal employees, current work provided by contractors, and new work; and as long as they are not used to undermine the pay and benefits of those who perform government work. The current privatization plan does not follow these guiding principles, and we urge you to correct its serious defects before it is implemented.

Sincerely,

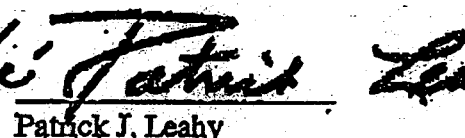

Edward M. Kennedy

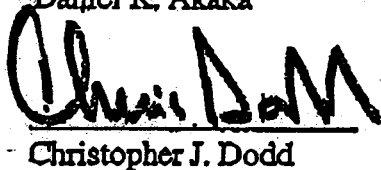

Tom Daschle

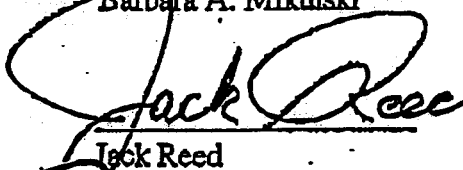

Joseph I. Lieberman

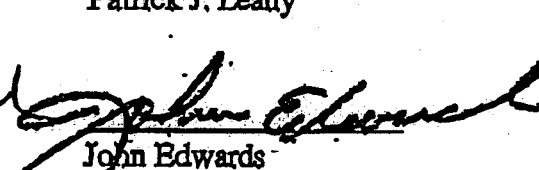

Daniel K. Akaka


Barbara A. Mikulski

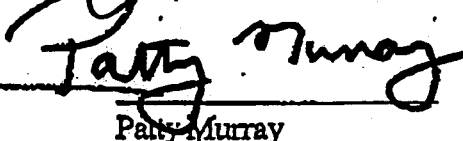

Patrick J. Leahy

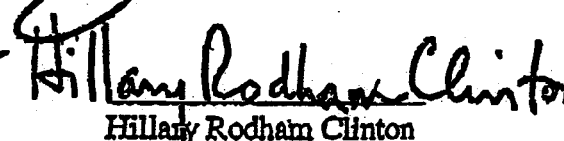

Christopher J. Dodd


Jack Reed

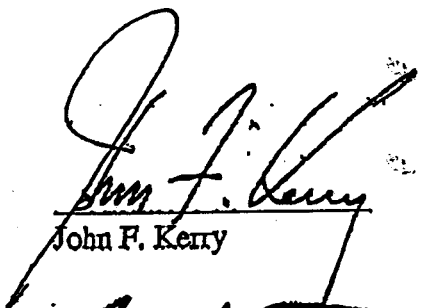

John Edwards

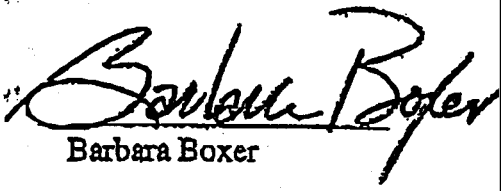

Tom Harkin


Patty Murray


Hillary Rodham Clinton


Jeff Bingaman


John F. Kerry


Barbara Boxer


Richard J. Durbin


Byron L. Dorgan


Russell D. Feingold

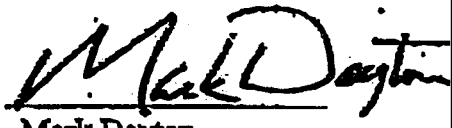

Tina Johnson


Robert C. Byrd


Evan Bayh


Paul S. Sarbanes

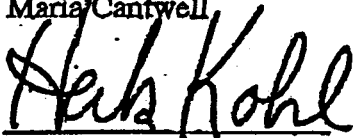

Frank Lautenberg



Mark Dayton


Maria Cantwell


John D. Rockefeller IV


Mark Pryor


Herb Kohl


Charles E. Schumer


Blanche L. Lincoln


Ron Wyden


Jon S. Corzine

Attachment D

**Letter of March 20, 2003
from
Congressman Barney Frank
to
The Secretary of Commerce, Donald Evans**

03/21/2003 13:55 FAX 508 697 0283

CONGRESSMAN BARNEY FRANK

03-001165-C 002

BARNEY FRANK
4TH DISTRICT, MASSACHUSETTS2210 RAYBURN BUILDING
WASHINGTON, DC 20515-2104
(202) 225-693129 CHAFFS STREET
SUITE 375
NEWTON, MA 02458
(617) 332-3520

Congress of the United States
House of Representatives
Washington, DC

558 PLEASANT STREET
ROOM 309
NEW BEDFORD, MA 02
(508) 999-6462222 MILLIKEN PLACE
THIRD FLOOR
FALL RIVER, MA 027
(508) 674-355189 MAIN STREET
BRIDGEWATER, MA 0
(508) 697-9403

March 20, 2003

The Honorable Donald Evans, Secretary
 U.S. Department of Commerce
 14th & Constitution Avenues, NW
 Room 2854
 Washington, D.C. 20230

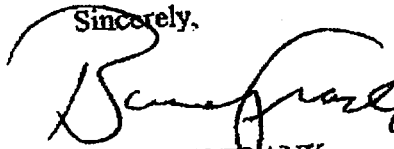
Dear Secretary Evans:

I am writing to you in support of the federal workers from the Department of Commerce's Seafood Inspection Program who have recently been threatened with having their positions commercialized through an administrative decision to list and designate their work as a commercial activity. Food inspection is an extremely important function of an agency that evaluates and inspects the fishery product of more than 2500 companies nationwide. As government workers within a federal agency, inspectors are not under the pressure of possible consequences, such as the loss of business or contracts in rejecting product, that a private company may experience.

In addition to the many benefits of having a governmental agency with federal workers in an inspection program of this importance, the Seafood Inspection Program is a nonappropriated agency. The National Marine Fisheries Service is actually reimbursed through the hourly rates charged to companies who rely on this inspection to ensure a safe product. In other words, this program pays for itself.

In closing, I hope you will not only consider, but implement the recommendation of Mr. Richard Cano, Acting Director of the Seafood Inspection Program, and publish a Notice in the Federal Register "advising that the designation of the activities of the USDC Seafood Inspection Program has been changed to reflect its inherently governmental function."

Sincerely,



BARNEY FRANK
 Member of Congress

BF/gpp

Attachment E

Letter of April 8, 2003

from

**Senator Susan Collins (Chairman of the U.S. Senate Committee on
Governmental Affairs)**

to

Under Secretary Lautenbacher

June

SUSAN M. COLLINS, MAINE, CHAIRMAN

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 MARK PRYOR, ARKANSAS

MICHAEL D. BOFF, STAFF DIRECTOR AND CHIEF COUNSEL
 JOYCE A. RECHTSCHAFFEN, MINORITY STAFF DIRECTOR AND COUNSEL

United States Senate

COMMITTEE ON
 GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

April 8, 2003

The Honorable Vice Adm. Conrad C. Lautenbacher, Jr. USN (ret.)
 Under Secretary for Oceans and Atmosphere
 National Oceanic and Atmospheric Administration
 14th and Constitution Avenue, NW
 Washington, DC 20230

Dear Mr. Lautenbacher:

It has come to my attention that the National Oceanic and Atmospheric Administration (NOAA) is considering designating the National Marine Fisheries Service (NMFS) Seafood Inspection Program (SIP) as a "commercial activity" under the Federal Activities Inventory Reform (FAIR) Act of 1998. I am concerned about the impact that this proposed designation could have on the U.S. seafood industry.

The SIP is a fully-reimbursable, or fee-for-service, seafood quality assurance and safety program that inspects and certifies approximately 17 percent of the fishery products consumed in the United States as well as more than 142 million pounds of seafood exports. Sanitation and hygienic practices are evaluated throughout the U.S. and its territories. Product lot inspection and HACCP compliance are evaluated at approximately 2,500 firms annually. The customers of these seafood producers rely upon the government assurance of quality and safety that SIP inspections provide.

Fisheries industry members are concerned that, should government inspectors be replaced with commercial vendors, confidence in the SIP's certification will be greatly diminished and consumer demand for U.S. seafood product dampened. It is my understanding that the European Union (E.U.) accepts SIP certifications only reluctantly. Should the SIP replace federal inspectors with contractors, the E.U. could choose to refuse recognition to SIP's certification.

In addition, NMFS has raised several interesting technical points regarding the applicability of the FAIR Act to the SIP as well as the nature of the inspectors' work, which NMFS believes to be inherently governmental. These arguments should be evaluated closely to ensure that the FAIR Act is being properly implemented in regards to the SIP.

APR. 8. 2003 3:43PM

The Honorable Vice Adm. Conrad C. Lautenbacher, Jr.
April 1, 2003
Page Two

In closing, I would ask that these concerns of the fishing community as outlined above, as well as NMFS's legal arguments, be considered fully as NOAA continues its process of determining whether these inspectors will ultimately be subject to competition. Getting this decision wrong could ultimately result in lost sales and jobs in an important U.S. industry.

Sincerely,



Susan M. Collins
Chairman

SMC:ar/ja

Attachment F

***NFInsider* (newsletter), page 1**

April 4, 2003



NFIinsider

NATIONAL FISHERIES INSTITUTE
1901 N. FT. MYER DR., #700
ARLINGTON, VA 22209
703-524-8880

www.nfi.org • www.aboutseafood.com

April 4, 2003; Volume 2, Issue 14
Thomas Ressler, Editor

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(ckeyes@mmib.com)**

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FDA Adopting EPA Level on Mercury? Maybe

The *Mobile Register* newspaper reported that the FDA has adopted the Environmental Protection Agency's lower mercury limits and will change its consumer advisory to include more species. However, sources at FDA say this is not the case. NFI is working with the U.S. Tuna Foundation to verify the information and craft a strategy going forward. Contact [Linda Candler](#).



USDC Seafood Inspection to be Privatized: Time to Act

The Department of Commerce is proposing to privatize the NMFS Seafood Inspection Program under the 1998 FAIR Act. NFI is concerned this effort will undermine the credibility and reliability of the voluntary, fee-for-service program. All members are encouraged to write to the National Oceanic and Atmospheric Administration in the Department of Commerce to oppose this privatization scheme. A form letter is attached [here](#) for your use. Contact [Justin LeBlanc](#).

NFI Comments to FDA on Prior Notice and Plant Registration

NFI submitted comments to the FDA today on [prior notice](#) of food imports and [food plant registration](#), two major elements of the Bioterrorism Act of 2002. NFI told FDA: that the proposed prior notice system will be unworkable and could create a large backlog of detained food at the ports of entry if left unrevised; FDA should reduce the amount of information necessary to make prior notice; allow more frequent amendments; coordinate with U.S. Customs to consolidate the notification into a single ACS submission; and allow amendment up to the time of arrival or a few hours later for perishable fish. Regarding food plant registration, NFI pointed out that the necessary information FDA is seeking is already available in the current FDA and U.S. Customs databases. NFI advocated an integrated information system that would meet both FDA and Customs requirements. NFI also questioned the need for a U.S.-based "agent" for the registration of all international food processing facilities and companies. Contact [Bob Collette](#) or [Dan Herman](#).



FDA Should Focus on Safety at the Source, NFI Tells GAO

FDA import inspection efforts are very good overall but should be more focused on improving food safety controls in the source countries, NFI told GAO investigators this week. The GAO is assessing the FDA seafood import inspection program, and investigating options for augmenting and improving the program at the request of Sens. Hollings (D-SC), Breaux (D-LA) and Lott (R-MS) of the Committee on Commerce, Science and Transportation. NFI also said that FDA should pursue, in cooperation with the seafood industry and qualified third parties, a voluntary program of import inspections in the source countries to enhance HACCP compliance and conformance to other U.S. food safety standards. NFI also told GAO that FDA should expand foreign country visits, seek equivalency agreements, and use port-of-entry testing as a means of verifying performance.

Attachment G

***NFInsider* (newsletter), pages 1-2**

May 23, 2003



NFI Insider

NATIONAL FISHERIES INSTITUTE
1901 N. FT. MYER DR., #700
ARLINGTON, VA 22209
703-524-8880

www.nfi.org • www.aboutseafood.com

May 23, 2003; Volume 2, Issue 21

Thomas Ressler, Editor

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Pew Commission Report to be Released June 4; Environmentalists Decry U.S. Fish Management

The Pew Oceans Commission will release its report to the public on June 4. Advance copies are available at <http://www.pewoceans.org>. The report is expected to call for a massive overhaul of U.S. fisheries management, including the establishment of the new federal Department of the Oceans and the abolishment of the Regional Fishery Management Councils. NFI and the Seafood Coalition are preparing a media and Congressional response. In a related development, the Marine Fish Conservation Network released a report this week similarly calling on Congress to dramatically reform U.S. fisheries management, urging creation of a new Department of the Oceans, abolishment of the Regional Fishery Management Councils, and application of the precautionary approach and ecosystem-based management principles. NFI told reporters that, "Quite simply, the Network recommendations are not based in fact." Contact [Linda Candler](#) or [Justin LeBlanc](#).



Rep. Young Proposes Rational Marine Mammal Policy

U.S. Rep. [Don Young](#) (R-AK) has introduced legislation (HR2142) to amend the Marine Mammal Protection Act to remove the requirement that accidental deaths of marine mammals as a result of commercial fishing operations be reduced to levels approaching zero, regardless of the abundance of the marine mammal population or the insignificance of the accidental deaths to the health of the marine mammal population. The NFI supports the legislation and believes that marine mammals should be managed as other renewable living marine resources. Commercial fishing operations should minimize marine mammal deaths to the extent practical and to levels that do not threaten the ability of the marine mammal population to sustain itself. It is not reasonable, however, to expect no accidental deaths of marine mammals, NFI believes. Contact [Justin LeBlanc](#).

House Approves Marine Mammal Relied for Defense Only

The U.S. House of Representatives has passed legislation loosening the definition of harassment of marine mammals by Department of Defense operations. The legislation as originally proposed by the House Resources Committee would have loosened the definition of harassment for everyone. The provision was included in the annual Department of Defense authorization bill. The Senate version did not contain the marine mammal provision. The House and Senate versions must now be reconciled in a Conference Committee before being sent to the President for signature into law. Contact [Justin LeBlanc](#).

EPA Administrator Whitman Resigns

Christine Todd-Whitman resigned as Administrator of the Environmental Protection Agency this week. Depending upon who is selected as the new Administrator, the change could have implications for EPA policies on important issues such as methylmercury and dioxin. Contact [Justin LeBlanc](#) or [Bob Collette](#).



USDC Seafood Inspection Privatization Proceeds

The National Oceanic and Atmospheric Administration (NOAA) has rejected a request from the Department of Commerce Seafood Inspection Program to cancel plans to privatize the program, despite objections from the NFI, Sen. Susan Collins (R-ME), and the head of the SIP. The SIP program now has 10 days to appeal to the full Department of Commerce, which has 10 days to respond. NFI opposes this privatization as it will undermine the utility and credibility of this important quality assurance program. NFI has contacted the Senate Commerce Committee and House Resources Committee to raise our concerns and to seek additional Congressional intervention. All interested members are strongly urged to write Secretary of Commerce Donald Evans, 1401 Constitution Ave NW, Washington, DC, 20230, using the [attached draft letter](#) or your own. Contact [Justin LeBlanc](#).

WTO Works Toward Free Trade in Seafood

The World Trade Organization this week unveiled its proposal for the next round of global trade negotiations, calling on nations to eliminate tariffs on fish and fish products under a zero-for-zero arrangement. Such an arrangement involves an agreement among all WTO member countries to phase out their tariffs on fish and fish products over time, with all countries reaching zero within a certain time frame. "The global elimination of seafood tariffs will promote free and fair trade around the world," said NFI President John Connelly. To read NFI's full news release, click [here](#).



ITC Crawfish Anti-Dumping Duty Review Slated for June 3

The International Trade Commission will hold a public meeting June 3 in Washington, DC to begin a five-year review of anti-dumping duties imposed on Chinese crawfish. The hearing, which will be open to the media and the general public, will begin at 9:30 a.m. and be held in the Main Hearing Room of the ITC Building, 500 E Street SW. A witness list is expected by June 2. Background information can be found in the [Federal Register notice](#) and the related [news release](#).

ITC Vietnamese Basa Anti-Dumping Hearing June 17

The International Trade Commissioner will hold a hearing June 17 in Washington, DC on the final phase of the anti-dumping investigation regarding certain frozen fish fillets from Vietnam. The hearing, which will be open to the media and the general public, will begin at 9:30 a.m. in the Main Hearing Room of the ITC Building, 500 E Street SW. A witness list is expected by June 16. Background information can be found in the [Federal Register notice](#) and the related [news release](#).

Seafood Industry Honors Commerce Under Secretary Lautenbacher

NFI this week presented its Public Service Award to Department of Commerce Under Secretary Vice Admiral Conrad Lautenbacher for his nearly 40 years of service to the American people. After a distinguished military career and a short private sector assignment, Lautenbacher returned to public service in 2001. He has focused his intellect and experience on the work of the Department of Commerce and NOAA in establishing sound ocean policies for the United States. To read our full news release, click [here](#).



Future Leaders Visit Washington, DC This Week

The 2003 NFI Future Leaders congregated in Washington, DC this week to kick off their leadership training. The group heard presentations from Dr. Bill Hogarth

Attachment H

Letter of May 9, 2003

from

Bob Jones (Executive Director, Southeastern Fisheries Association)

to

Secretary of Commerce, Donald Evans

(E-mail copy)

May 9, 2003

The Honorable Donald Evans
US Secretary of Commerce
Main Commerce Bldg.
Washington, DC

Dear Mr. Secretary:

Many of our members fear their ability to conduct business will be critically impacted by the recent National Marine Fisheries Service decision to out-source the USDC Seafood Inspection Program (SIP). They are concerned, and rightfully so, that the credibility of a privatized certification will be questioned by their customers. Privatized businesses are more concerned with bottom line profit than maintaining the integrity of the seafood inspection program. Since it is possible that more than one private entity would provide the inspection service, I am concerned the required consistency of a government inspection will be seriously compromised to the point that it would be meaningless. I have already been told by my members that if the USDC inspection goes to a private vendor then they will not use it any longer.

It is hard to understand that while Congress is making massive expenditures to bolster our national food security, up to 150 professional, trained federal food inspectors are being fired. This is a classic example of the national interest being subordinated to the turf interests of the National Marine Fisheries Service.

The SIP has provided inspection services for several decades as authorized and established under the Agricultural Marketing Act to facilitate the trade of agricultural products. The SIP provides these necessary assurances as a Federal inspection body that has established an international reputation for service with integrity and technical expertise.

In order to provide you with additional details, I have enclosed a copy of the formal Challenge that was filed by SIP to this misguided, illogical, and counterproductive policy decision by NMFS. I have attempted to summarize the key issues for you below:

1. Point of Law – Section 4 (b)(3) of the FAIR Act clearly and specifically excludes programs that operate with non-appropriated funding.

Congress recognized that the ultimate purpose for contracting out was to reduce the costs of government to the benefit of the U.S. taxpayers. The SIP receives no appropriated funding, yet NMFS flagrantly disregards this fact despite the legal opinion of a senior Federal attorney (see attachment at end of Challenge).

2. Inherently Governmental Function – Agencies that perform food safety functions through interpreting and applying Federal food regulations have always been considered as “inherently governmental” to assure a safe food supply and protect the public health of the American consumer. This is presently true of food inspection functions of the USDA and the FDA. The Seafood Inspection Program shares the same job series (namely, Consumer Safety Officers and Inspectors) as inspection staff in FDA, and many in USDA. Congress has been asked to provide massive funding increases for food safety protection in all areas, including additional personnel; meanwhile the NMFS is proposing elimination of over 150 trained inspection personnel.
3. “Inherently governmental” function is further established by NOAA in its identification of the SIP as a “critical function that must be re-established within the first 12 hours” after a national emergency incident under the NOAA Continuity of Operations Plan (COOP) under Presidential Decision Directive 67. How can NMFS/NOAA identify these activities as “not inherently governmental” (i.e., commercial) for the purpose of meeting their FAIR Act inventory quota, and simultaneously identify them as “critical functions” under a National emergency?
4. In addition, the inherently governmental functions are further illustrated by the inclusion of the USDC (SIP) among the Interagency Food Working Group of Federal agencies, assembled by the Homeland Security Council (HSC), that comprise the food regulatory framework in the United States. The events of September 11, 2001, have clearly demonstrated that the United States is vulnerable to domestic terrorism attacks with horrific consequences. Today safeguards for all aspects of our food production from processing and shipping from international sources to domestic oversight must be re-evaluated. In addition to domestic functions, the SIP has a substantial, and increasing presence in some of the major foreign seafood processing countries that supply the American consumer’s seafood.
5. Statutory Authorization – The SIP relies on the enabling legislation of the Agricultural Marketing Act of 1946 as the basis for providing inspection and certification activities, as well as providing for “...assessment and collection of such fees as will be reasonable and as nearly as may be to cover the cost of the service rendered...”. This statutory basis is why the

SIP should be exempt from the FAIR Act as previously stated under Section 4(b)(3).

6. Economic Considerations - Aside from NOT saving the government money, the A-76 study pursuant to the publishing on the FAIR Act inventory will COST the American taxpayer a substantial amount of money to complete. The cost of this ill-conceived selection is estimated to approach \$400,000 to be borne by the parent agencies. If the A-76 study supports the agency position, potential severance payments estimated at \$1.8 million may be further obligated to the American taxpayer. Finally, the parent agency will lose approximately \$1.6 million annually paid by the SIP for overhead expenses.
5. Credibility considerations – The strength and integrity of food safety programs is highest when the services are rendered by impartial government employees. Foreign governments and buyers often desire Federal assurances of safety and quality of fishery products that they are receiving from the United States. Similarly the American consumer has become accustomed to marks on agricultural food products that denote governmental oversight of their production and distribution.

We respectfully urge you to stop the proposed NMFS action. It does not fulfill the intent of Congress under the FAIR Act. It will not prevent breaches of our national food security. It will not enhance the safety of the U.S. food supply. It will not save the American taxpayer money.

If after reviewing this request you still don't want to slow down NMFS, please consider transferring the SIP and its authorities to the USDA for more efficient consolidation of food safety functions.

Sincerely yours,

Bob Jones
Executive Director

Attachment: Challenge to the Listing and Designation of the Seafood Inspection Program as a Commercial Activity

Attachment I

***Wave* article**

March 25, 2003

On The Radar Screen

Will U.S. seafood inspection program be privatized? No way, says program head

By John Fiorillo

Mar. 25 2003 - *The Wave News Network* - A new National Marine Fisheries Service plan to effectively privatize the USDC Seafood Inspection program is being challenged by Richard Cano, the acting head of the inspection program, who charges that contracting out the service would be costly for taxpayers and could threaten the safety of America's seafood supply.



In a 15-page document submitted in early March to Sonya Stewart, chief administrative officer for the National Oceanic and Atmospheric Administration, Cano argues that NMFS should abandon its recent decision to explore privatizing the inspection program under the Federal Activities Inventory Reform Act, or FAIR Act, because doing so will not benefit taxpayers, the seafood industry or consumers.

The FAIR Act of 1998 requires federal agencies each year to submit to the Office of Management and Budget (OMB) a list of activities performed by government employees that are "not inherently governmental functions" and thus could be contracted out to private companies. The ultimate purpose for contracting out such activities is to cut taxes by reducing the size of the federal government.

John Oliver, deputy assistant administrator for NMFS, says the proposal does not seek to privatize the entire seafood inspection program. He says the plan calls for the potential contracting out of the functions performed by 157 seafood inspectors that are now part of the program. The management of the program, he adds, would remain under government control.

"What's not clear is whether the actual inspection of the seafood can be done more effectively under private contract," Oliver says.

At the moment, the program is completely paid for by the fees charged to seafood companies requesting inspection services. No appropriated funds are used to support the program.

Cano estimates that cutting the 157 inspectors could cost taxpayers more than \$1.8 million in severance pay for the employees. Add to that figure another \$392,000 to complete a study required as part of the FAIR Act process, and the cost tops \$2 million.

Additionally, NOAA would have to find a way to replace the \$1.6 million the program contributes annually toward the agency's overhead costs, Cano argues in his challenge.

"Would the same level of support be realized if these activities are contracted to the private sector, or would the taxpayer find that additional funds were necessary to support NMFS/NOAA administrative functions?" Cano asks.

If the program is privatized, he says, seafood industry firms that now rely on the service might discontinue use of the program, and the government would likely have to use federal staff to certify the private inspection firms.

Cano also questions whether the same level of cooperation that now exists between USDC inspectors and USDA inspectors in 16 states would continue. Cooperative agreements between these inspectors result in better use of federal and state resources to the benefit of the industry and consumers, he adds.

A program looking for a home

The fact that NMFS offered up the seafood inspection program for potential privatization is not a surprise.

The agency has for years been working in one way or another to shed the program, which both Cano and Oliver admit doesn't belong under the Commerce Department. The program, both agree, fits much better under the U.S. Department of Agriculture or the FDA.

As recently as 1999, under the Clinton administration, legislation was drafted that would have moved the agency out of NMFS and over to the FDA. The legislation never passed, but discussions about moving the program continued with the change of administrations. A program review under the Bush administration completed late last year confirmed what everyone already knew – the program doesn't fit well under the Department of Commerce.

Last summer, Oliver and Sam McKeen, who at the time headed up the USDC seafood inspection program, met to discuss the idea of privatizing the program. McKeen has since retired, and Cano is acting director of the program.

In those meetings, McKeen was told that the program was going to be submitted for privatization under the FAIR Act because it was viewed as "not inherently a governmental function."

"McKeen's only push back," recalls Oliver, "is that it would cause a morale problem in his program. It has the potential to create a problem because employees feel they are not wanted or loved or might lose their jobs."

Throughout the fall and into the new year, NOAA and the folks at the seafood inspection program met and exchanged e-mails regarding the privatization issue, but no level of discussion could heal the rift, says Cano.

"There was no analysis made as to why this program should be privatized," says Cano. "Knowing that we are not a favored program within the agency, we have to view this as we were the sacrificial lambs."

Oliver said that, even if the program is eventually moved to FDA or USDA, it is important nonetheless to perform the study to determine if the program can be made more cost effective through some level of private contracting.

"We want to make sure that what we are transferring is the most effective and cost efficient for the taxpayer, he said.

Government function or not?

The question of whether the seafood inspection program is inherently a government function is central to the current flap over the program's future.

The FAIR Act defines *inherently government function* this way: "...a function that is so intimately related to the public interest as to require performance by Federal Government (sic) employees."

"The USDC Seafood Inspection Program routinely evaluates the safety, wholesomeness, proper labeling, and quality of fish and fishery products, as well as determining the adequacy of sanitation and hygienic practices of the processing facility and the safety of the process use in the manufacture of food," Cano wrote in his challenge.

These functions are equivalent to the functions performed by the USDA and FDA, said Cano and both of those agencies have determined that these functions are inherently governmental functions.

Why then, he wonders, would NOAA consider the seafood program a non-governmental function?

Cano also points out in his challenge that under a federal plan to ensure the continuity of the U.S. government in the advent of a national emergency like 9/11, NOAA and NMFS identified the seafood inspection program to be a "critical function that must be re-established within the first 12 hours" after an incident."

"Therefore, it is inconceivable how NMFS/NOAA can in one sense consider the USDC Seafood Inspection Program to be a 'critical function', while simultaneously

under the FAIR Act conclude that it is not inherently governmental, but rather commercial, and thereby should be contracted out to the private sector," Cano said.

"We value the service that seafood inspection provides, that's not the issue here," says Oliver. "The issue is functionality and cost effectiveness. Even though the industry is paying for the program, they have the same right to make sure they are paying for the most cost efficient program."

Does anyone in the industry care?

The USDC program inspects approximately 17 percent of the fishery products consumed in the United States and more than 142 million pounds of exported seafood, Cano wrote in his challenge. USDC inspectors visit roughly 240 seafood processing plants throughout the United States, America Samoa and Puerto Rico. More than 2,500 firms use the service annually, Cano adds. The program awards a USDC Grade A seal to products meeting certain quality levels. USDC personnel also play a role in the national school lunch program and other federal food programs.

And for companies like Boston-based Stavis Seafoods, the program is an important part of its business.

"If it went private I think it would make it a less attractive program for some of our customer," says Richard Stavis, company CEO and president. "Having the government imprimatur on it offers a certain warranty of sorts."

Stavis is concerned that privatizing the service could lead to varying levels of service between private inspections firms and this could fuel a situation where companies "shop around" for an inspection report that suits their needs.

"With the USDC, it's unambiguous; there is a certain standard they adhere to. If you have 5 or 10 players (doing the inspections) then each one of those will have separate reputations for inspections. It's like when people start shopping around for a lab that will give them the results they want," Stavis says.

Bill DiMento, director of quality assurance and regulatory affairs for Fishery Products International USA, says the issue boils down to one word: credibility.

"It's ludicrous. To have that government agency transferred to the private sector simply puts the inspection program in the hands of the fox guarding the chicken coop," says DiMento.

But the biggest drawback to privatizing the program's inspection service could be its impact on international trade, he says.

DiMento says the foreign governments his company deals with don't want to talk to a private company when it comes to seafood inspection; they want some sort of government-to-government assurance, he says.

"Without the seafood inspection program, I firmly believe we would be at a huge loss in dealing with foreign governments regarding seafood trade issues," DiMento concludes.

Next steps

Cano filed his challenge on March 5. NOAA has roughly a month to answer the challenge. What comes next depends on how NOAA responds.

Nevertheless, Cano says he is optimistic about the future of the program and the likelihood that it will, once and for all, be relocated to either the USDA or FDA, a presumably better home for the now orphan agency.

"I believe sincerely that if this challenge is put to bed...because the agency is very supportive of seeing us moved out of DOC then I would assume they are supportive of me working with industry and FDA and USDSA and trying to find a home in a real food agency," Cano says.

Share your opinion on this column. Send your letters to the editor at john@thewaveonline.com . Please include your full name, city/state or province and company name.

Attachment J

***Wave* editorial**

March 26, 2003

On The Radar Screen

If it ain't broke, why fix it?

By John Fiorillo

Mar. 26 2003 - *The Wave News Network* - Yesterday we brought you the story of a National Marine Fisheries Service plan to privatize the USDC Seafood Inspection Program ([Click here to read the article](#)).

In a nutshell, NMFS claims that the 157 seafood inspectors that are part of the program are performing a function that is "not inherently governmental." In other words, we don't necessarily need the government to do the inspecting; we could leave that to the private sector.

I do not agree.

In the article, Bill DiMento, director of quality assurance and regulatory affairs for Fishery Products International USA, says the issue boils down to one word: credibility.

I think he is correct. DiMento points out quite correctly, I think, that to have the inspection program effectively transferred to the private sector simply puts the inspection program in the hands of the fox guarding the chicken coop -- at least from a perception point of view.

That's not to say that private inspection firms under government oversight couldn't do a fine job of inspecting seafood. But the issue is bigger than that.

In an age where food safety and security is a governmental priority and at a time when new food safety issues (chloramphenicol, for example) seem to be popping up everywhere, there is an inherent value in having the government involved in seafood inspection.

The program pays for itself and is not a drain to taxpayers. Most of the companies I spoke with in writing the story seem more than pleased with the service they are receiving from the program.

It appears that this program is working just fine -- if it ain't broke, why fix it?

But one thing must happen -- and soon. The seafood inspection program must be moved out of the control of the U.S. Department of Commerce and placed under the auspices of either the USDA or the FDA.

For years, there have been efforts aimed at moving this program out of USDC. Let's do it now and put this issue behind us.



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Attachment K

***Wave* editorial**

May 23, 2003

Featured Article...

Oregon bill would allow face-to-face price negotiations between processors, fishermen

The Oregon legislature is considering a bill that would enable fishermen and seafood processors to meet in a state-supervised forum to negotiate prices before the start of a fishing season.

[Read Full Story>>](#)

On The Radar Screen by John Fiorillo

Privatizing USDC seafood inspection program is wrong

It's the wrong decision -- plain and simple. I'm talking about the National Oceanic and Atmospheric Administration's decision to proceed with a plan to privatize the USDC Seafood Inspection program. If this happens, this industry will lose another tier of experience and know-how, and it will lose this experience in an area of critical importance -- seafood quality and safety.

[Read Full Story>>](#)

In The Marketplace by Dan McGovern

American lobster exporters' lucrative EU market

Close to 3 million pounds of live American lobster (*homarus spp.*) was shipped to the EU in the first quarter worth nearly \$19 million -- a 6% drop in volume but up \$2 million in value compared to Q1 2002.

On a price per pound basis, live lobster was worth \$6.52 during this year's Jan.-March period -- up \$1.05 over Q1 2002.

[Read Full Story>>](#)

On The Radar Screen

Privatizing USDC seafood inspection program is wrong

By John Fiorillo

May. 23 2003 - *The Wave News Network* - It's the wrong decision -- plain and simple.

I'm talking about the National Oceanic and Atmospheric Administration's decision to proceed with a plan to privatize the USDC Seafood Inspection program. Yesterday, NOAA denied a challenge to its plan to privatize the service. ([Click here for details on this story.](#))

Rich Cano, acting head of the seafood inspection program, has 10 days to appeal yesterday's decision, and he says he will file an appeal but he isn't optimistic.

"I personally do not think (the appeal) is going to make any difference," he told me yesterday.

If this program is privatized it will be a sad end to what is by most measurements a successful, well-run program. And it didn't have to end this way.

The USDC program -- a voluntary, for-fee program -- inspects approximately 17 percent of the fishery products consumed in the United States and more than 142 million pounds of exported seafood, according to Cano. USDC inspectors visit roughly 240 seafood processing plants throughout the United States, America Samoa and Puerto Rico. More than 2,500 firms use the service annually, Cano adds. The program awards a USDC Grade A seal to products meeting certain quality levels. USDC personnel also play a role in the national school lunch program and other federal food programs.

The program is important to industry, and those who use it are none too happy about what is happening.

"It's ludicrous. To have that government agency transferred to the private sector simply puts the inspection program in the hands of the fox guarding the chicken coop," Bill DiMento, director of quality assurance and regulatory affairs for Fishery Products International USA, told me months ago when we first reported this story.

Richard Stavis, CEO and president of Boston-based Stavis Seafoods, is concerned that privatizing the service could lead to varying levels of service between private inspections firms and this could fuel a situation where companies "shop around" for an inspection report that suits their needs.

Everyone agrees that the program doesn't fit under the Commerce Department's umbrella. The fact that NMFS offered up the seafood inspection program for potential privatization is not a surprise.

The agency has for years been working in one way or another to shed the program. The program fits much better under the U.S. Department of Agriculture or the FDA.

So, why the rush to privatize it now? Why not step up efforts to relocate this program to a proper agency?

I can only imagine the petty turf battles involved in this decision. And, frankly, I don't care about that.

And neither should you. This is a good, valuable program for the seafood industry. It assures a level of quality that is backed by the government and a top team of experienced inspectors.

If this program is privatized, many of the 157 inspectors now on the job will likely be gone for good. Sure some will find work with the private agencies, but many -- the most senior and most experienced -- will likely collect their severance and head off to quieter days.

If this happens, as Cano predicts it will, this industry will lose another tier of experience and know-how, and it will lose this experience in an area of critical importance -- seafood quality and safety.

Time to step up folks. Call your congressperson, lodge your complaints with John Oliver, deputy assistant administrator for NMFS (John.Oliver@noaa.gov), and make your voices heard. Otherwise, this program looks like it is headed toward privatization.

Share your opinion on this column. Send your letters to the editor at john@thewaveonline.com. Please include your full name, city/state or province and company name.



Attachment L

***Wave* article**

May 28, 2003

Food Safety**NOAA to step up efforts to transfer Seafood Inspection Program**

By John Fiorillo

May. 28 2003 - *The Wave News Network* - The National Oceanic and Atmospheric Administration (NOAA) will step up efforts in the coming months to transfer the USDC Seafood Inspection Program to either the FDA or the U.S. Department of Agriculture, John Oliver, deputy assistant administrator for NOAA Fisheries, told **The Wave** Tuesday.

"I would say, though, that we have not been as aggressive as maybe we will be in the next six months in trying to build momentum for transfer," Oliver said.

Last week, NOAA denied a challenge to its plan to privatize the voluntary, for-fee inspection service. ([Click here to read related articles](#)).

In March, Richard Cano, acting head of the USDC Seafood Inspection Program, formally challenged a NOAA Fisheries plan to explore privatizing the inspection program under the Federal Activities Inventory Reform Act, or FAIR Act. The FAIR Act of 1998 requires federal agencies each year to submit to the Office of Management and Budget (OMB) a list of activities performed by government employees that are "not inherently governmental functions" and thus could be contracted out to private companies.

Cano said his agency will appeal last week's ruling, but he said it is unlikely the appeal will be successful.

If, as expected, the appeal is rejected, NOAA Fisheries would begin a study to compare the cost of operating the current Seafood Inspection Program against the expense involved in contracting out the inspection services of the program's 157 inspectors -- a necessary step in the agency's plan to privatize the seafood inspection program.

Oliver estimates that study could take up to a year or more to complete.

"Nothing is going to happen overnight. It's a process that takes a fair amount of time," he said.

In the meantime, he added, his agency would step up efforts aimed at transferring the seafood inspection program to either the FDA or USDA.

The agency has for years been working to shed the Seafood Inspection Program, which both Cano and Oliver admit doesn't belong under the Commerce Department.

"We already have some draft legislation from the previous attempt (to transfer). We would need to update that; it's matter of revising that (legislation) and getting agreement with somebody," said Oliver.

Whether that "somebody" is the FDA or USDA remains unclear.

The National Fisheries Institute said in a message to its members that it is opposed to the privatization of the Seafood Inspection Program. NFI has contacted the Senate Commerce Committee and House Resources Committee urging Congressional intervention on the issue.

Sen. Susan Collins (R-ME) said she too is concerned about the privatization of the program.

"The fishing industry has raised important concerns about the impact that privatization might have on the integrity of the program. I will be watching closely to ensure that the program continues to meet the same quality assurance and safety standards that the program has always offered the industry," she said.

The USDC program inspects approximately 17 percent of the fishery products consumed in the United States and more than 142 million pounds of exported seafood. USDC inspectors visit roughly 240 seafood processing plants throughout the United States, America Samoa and Puerto Rico. More than 2,500 firms use the service annually. The program awards a USDC Grade A seal to products meeting certain quality levels. USDC personnel also play a role in the national school lunch program and other federal food programs.

Attachment M

Letter of March 19, 2003

from

**Dr. Richard Zurbrigg (Director, Fish, Seafood and Production Division,
CFIA)**

to

Richard Cano (Acting Director, Seafood Inspection Program, USDC)



Canadian Food Inspection Agency
Agence canadienne d'inspection des aliments
159 Cleopatra Drive
Ottawa, Ontario
K1A 0Y9

MAR 19 2003

Mr. Richard Cano
A/Director, Seafood Inspection Program
National Marine and Fisheries Service
National Oceanic & Atmospheric Administration
Department of Commerce
1335 East-West Highway
Silver Spring, Maryland 20910

Dear Mr. Cano:

In recent discussions with Vance McEachern, National Manager, International Programs, Fish, Seafood and Production Division (FSPD), Canadian Food Inspection Agency (CFIA) you identified potential changes to the delivery of the Seafood Inspection Program (SIP) of the United States Department of Commerce (USDC), if the activities of the SIP are listed as non-inherently government functions under the US Federal Activities Inventory Reform (FAIR) Act of 1998. You also requested CFIA's understanding of the impact of such a listing of SIP activities to the proposed arrangement between CFIA and the USDC concerning the inspection and certification of fish products destined for Canada.

As Director of FSPD, I can confirm that the CFIA would not be able to enter into an arrangement such as the one currently being proposed between the CFIA and USDC if critical program delivery components are not maintained. For example, this would be the case if the competent authority conducting activities did not retain legislative authority to implement regulations necessary to control production and enforce compliance of recognized standards. It is our understanding as well, that under such a listing the activities currently conducted by SIP may be privatized and conducted by multiple entities. If this is correct, any arrangement would be operationally difficult to audit and implement.

It must be understood that any restructuring of the SIP will nullify the conclusions reached in the review conducted by CFIA on the current program. Any subsequent reassessment of a new fish inspection and control program to determine if it would satisfactorily meet the criteria for an arrangement would be highly unlikely, given the level of new resources that would be required by the CFIA to proceed.

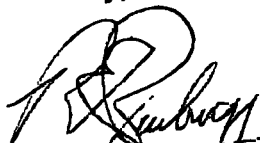
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Canada

- 2 -

Thank you for informing us of this proposal. For the above reasons, I trust that the program will remain intact and continue to have legislative authority over its activities. Please keep me apprised of the situation.

Sincerely,



Dr. Richard Zurbrigg
Director

Fish, Seafood and Production Division

Tel: (613) 221-7028

Fax: (613) 228-6648